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Supreme Court, U.S.
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No. 93-2006

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BANCA NAZIONALE DEL LAVORO,

Petitioner,

v.

SMS HASENCLEVER GMBH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA AND
THE COURT OF APPEALS OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 8(a)(1)(F) of the Export Administration Act of 1979, 50 U.S.C. App. § 2407(a)(1)(F), applies to a letter of credit when (a) the letter of credit contains no condition or requirement compliance with which is prohibited by regulations issued pursuant to Section 8(a)(1)(F), (b) the transaction to which the letter of credit applies is not in United States commerce, and (c) the beneficiary is not a United States person.

2. Whether a reviewable issue of federal law is presented by a state court ruling that has fully and finally decided as a matter of state law a bank's liability to honor documents presented under a confirmed letter of credit when (a) the only alleged issue of federal law arises in a separate and subsequent transaction between the bank and a third party, and (b) the state court has determined that this federal issue is legally irrelevant to the bank's liability to the beneficiary under state law.

PARTIES

Petitioner Banca Nazionale del Lavoro ("BNL") is an Italian bank with an agency in Atlanta, Georgia.

Respondent SMS Hasenclever GmbH ("SMS") is a German corporation with its principal place of business in Düsseldorf, Germany. SMS's parent corporation is SMS AG, also a German corporation. SMS has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner BANCA NAZIONALE DEL LAVORO ("BNL") requests the United States Supreme Court to review by writ of certiorari a judgment of the Georgia Court of Appeals. The Supreme Court of Georgia has denied a BNL petition for certiorari presented on essentially identical grounds. Respondent SMS HASENCLEVER GMBH ("SMS") respectfully requests that this Court deny BNL's present petition for the following reasons.

STATUTORY AND REGULATORY PROVISIONS

Section 8(a)(1)(F) of the Export Administration Act of 1979, as amended (the "EAA"), 50 U.S.C. § 2407(a)(1)(F), provides in relevant part:

> [T]he President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of

> any form of boycott pursuant to United States law or regulation:
>
> * * *
>
> (F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

U.S. Department of Commerce regulations implementing the antiboycott provisions of the EAA are commonly referred to as the "Antiboycott Regulations." 15 C.F.R. Part 769. The Antiboycott Regulations provide in relevant part:

> § 769.1(d)(20). *See § 769.2(f) on "Letters of Credit" to determine the circumstances in which paying, honoring, confirming, or otherwise implementing a letter of credit is covered by this part.*
>
> § 769.2(f) *Letters of Credit*
>
> (1) No United States person may pay, honor, confirm, or otherwise implement a letter of credit which contains a condition or requirement compliance with which is prohibited by this part, nor shall any United States person, as a result of the application of this section, be obligated to pay, honor or otherwise implement such a letter of credit.
>
> * * *
>
> (6) *This prohibition*, like all others, applies only with respect to a United States person's activities taken with intent to comply with, further, or support an unsanctioned foreign boycott. In addition, it *applies only when the transaction to which the letter of credit applies is in United States commerce and the beneficiary is a United States person.*

(Emphasis added.)

STATEMENT OF THE CASE

SMS is a German manufacturer. In June 1990, SMS shipped equipment with an invoice price of $21 million from Europe to Iraq. R714, ¶¶ 15-17.[1] The equipment never entered United States commerce. SMS was to be paid for the equipment pursuant to two letters of credit confirmed by BNL's Atlanta agency. R723-34; R1089-92. In July 1990, SMS presented shipping documents to BNL-Atlanta entitling SMS under the letters of credit to payment of 60% of the invoice price of the equipment, or $12.6 million.[2] SMS's documents strictly complied with each of the conditions for payment in the credits. Georgia Court of Appeals' Opinion, Pet. App. 4a.

SMS's documents included certifications that SMS's equipment had not been manufactured in Israel, so-called "negative certifications." R1101, 1104, 1106, 1108. SMS made these certifications only because commercial authorities in Germany had advised SMS that its equipment could not be imported into Iraq without them. R1138-39. Contrary to BNL's Petition (p. 8), SMS's inclusion of negative certifications in its documents was not "gratuitous" or "intended to further the Arab boycott of Israel." The certifications violated no term of the credits and no provision of German law.

Nor did SMS violate U.S. law by including negative certifications in its documents and presenting those documents to BNL. The Antiboycott Regulations exempt letter of credit transactions if either (1) the beneficiary of the credit (SMS) is not a U.S. person, or (2) the goods never entered U.S. commerce. 15

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[1] Citations are to the record page in the Georgia Court of Appeals.

[2] BNL alleges that two subsequent presentations of documents certifying the arrival of SMS's equipment on site in Iraq and entitling SMS to an additional 10% of the price of the equipment are also at issue. Petition, p. 8. In fact, BNL has never pleaded an issue of federal law with regard to SMS's claims for dishonor of those documents. BNL's only defense has been an interpretation of letter of credit law that the Georgia courts have rejected. BNL's liability to SMS for these two dishonors is, accordingly, final as a matter of law and not properly the subject of the present Petition.

C.F.R. § 769.2(f)(6). It is undisputed that both conditions were met here.

BNL has struggled throughout this litigation to find a reading of the Antiboycott Regulations that, despite these exemptions, would permit BNL to dishonor SMS's documents. BNL's theories have varied from court to court and brief to brief. BNL now argues that it is excused from its obligation under state law to honor SMS's documents because the Antiboycott Regulations allegedly prohibit BNL from later using SMS's documents to obtain reimbursement from a third party.

BNL bases this argument on an informal letter, dated January 18, 1990, from a junior Commerce Department official. Pet. App. 13a. The letter confirms that SMS's presentation of documents to BNL for payment is exempt from the Antiboycott Regulations. It also states, however, that after BNL has paid SMS — i.e., *after* consummation of the transactions at issue in this lawsuit — the Antiboycott Regulations will prohibit BNL from using SMS's documents to obtain reimbursement from a third party.

The Regulations themselves contradict this opinion. They provide that where, as here, a letter of credit comes within the exemptions of 15 C.F.R. § 769.2(f)(6), the letter of credit is exempt from *all* antiboycott prohibitions. See, pp. 11-12, *infra*. Despite repeated requests, the Commerce Department has never explained how the January 1990 letter can be reconciled with the terms of the Regulations. R1144-47, 1173-74. Nor has BNL cited any official Commerce Department pronouncement, before or after the January 1990 letter, endorsing the opinion in that letter. Indeed, the interpretation of the Antiboycott Regulations in the letter is so obviously erroneous that BNL filed a special pleading with the trial court putting on record its own disagreement with that interpretation. R1305-07.

BNL's defense in the present litigation thus rests on an informal reading of the Antiboycott Regulations by a junior bureaucrat at the Commerce Department that is: (a) contradicted by the Regulations themselves; (b) not supported by any official Commerce Department pronouncement

or endorsed by any more senior Commerce Department official; and (c) disavowed on the record by BNL. Nevertheless, BNL attempts to invest this reading of the Regulations with the imprimatur of the federal government by repeatedly characterizing it in the Petition as "United States public policy" (p. 13), the "position of the Antiboycott Office" (p. 15), a "federal agency's interpretation of the law" (*id.*), and the like. BNL's reasons for thus continuing to rely on an obvious misreading of a federal regulation are not disclosed in its Petition.

In fact, the real obstacle to BNL's ability to obtain reimbursement if it satisfies the judgment of the Georgia courts and pays SMS is not the Antiboycott Regulations. In August 1990, shortly after BNL's dishonor of SMS's documents, Iraq invaded Kuwait. The Gulf War and ensuing international sanctions have made BNL's reimbursement by the Iraqi bank that issued the original letters of credit highly improbable, with or without SMS's documents. In confirming the letters of credit, BNL specifically undertook the risk that, if a war occurred, it might have to pay SMS without being reimbursed. See, *Centrifugal Casting Mach. Co. v. American Bank & Trust Co.*, 966 F.2d 1348, 1352 (10th Cir. 1992) (BNL, as confirming bank for an Iraqi letter of credit, undertook the risks of "supervening illegality, impossibility, war or insurrection"). BNL has gone to elaborate lengths to concoct a defense under the Antiboycott Regulations only because it wishes to avoid the consequences of the risk it knowingly accepted when it confirmed the letters of credit.

SUMMARY OF THE ARGUMENT

The decision of the Georgia Court of Appeals conflicts with no decision of any other court, state or federal; it sets no new precedent; and it has no effect on any third party. BNL's Petition should not, therefore, be granted unless the Court of Appeals has decided "an important question of federal law" that should be settled by this Court. See, Rules of the Supreme Court of the United States, Rule 10.1(c).

BNL's Petition presents no such question. It consists primarily of long quotations from the hortatory sections of the EAA and unsupported allegations that grave issues of national importance are at stake. Stripped of the rhetoric, BNL's Petition makes only two legal arguments: (1) that Section 8(a)(1)(F) of the EAA, 50 U.S.C. App. § 2407(a)(1)(F), provides BNL with a statutory defense to its obligation under state law to honor SMS's documents; and (2) that the Georgia Court of Appeals has transgressed the "regulatory scheme" of the EAA by holding BNL obligated under state law to honor documents conforming to a letter of credit when the EAA allegedly prevents BNL from using those documents to obtain reimbursement.

BNL's first argument is wrong; the second is both wrong and irrelevant:

1. The sole conditions for excusing a bank on antiboycott grounds from honoring a letter of credit are set out in Section 8(a)(1)(F) of the EAA. By its terms, that provision does not apply to the transactions at issue here.

2. The Georgia Court of Appeals' ruling that BNL wrongfully dishonored SMS's documents rests entirely on state letter of credit law. No ruling on any question of federal law is necessary to the Court's decision. The Court's only reference to federal law is *dictum*.

3. The transactions at issue here are exempt from all antiboycott prohibitions by the terms of the Antiboycott Regulations and the EAA. If a junior bureacrat's misreading of the law is a genuine obstacle to BNL's reimbursement rights against a third party, BNL remains free to challenge that misreading through federal administrative procedures and in federal courts.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Letter of Credit Defense in Section 8(a)(1)(F) of the EAA Does Not Apply.

In Section 8(a)(1)(F) of the EAA Congress specified the sole conditions under which a bank may be excused on antiboycott grounds from honoring documents presented under a letter of credit. BNL contends that those conditions were satisfied in the present case, and that the Georgia courts erred by failing to recognize this federal statutory defense to SMS's state law claims. Petition, pp. 21-23.

Section 8(a)(1)(F) of the EAA excuses a bank from paying or otherwise honoring "a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph . . ." The letters of credit at issue in this litigation contain no "condition or requirement compliance with which is prohibited by [the Antiboycott Regulations]." BNL admits this. Petition, p.6. On the contrary, the Antiboycott Regulations — the "regulations issued pursuant to this paragraph" — expressly *exempt* these letters of credit from their prohibitions. 15 C.F.R. § 769.2(f)(6). Section 8(a)(1)(F) is therefore inapplicable by its terms.

BNL itself admitted the inapplicability of this statutory defense in its Brief to the Georgia Court of Appeals, where it argued "that the spirit, if not the letter of these absolute defenses, should apply here and shield BNL from any payment liability." Brief of Appellant, p. 21. An alleged inconsistency of a state court ruling with the "spirit" of an inapplicable federal statute is not "an important question of federal law" suitable for review by the United States Supreme Court.

II. The Decision of the Georgia Court of Appeals Rests on State Letter of Credit Law; the Court Decided No Issue of Federal Law.

Since the statutory provision authorizing banks to dishonor letter of credit documents on antiboycott grounds does not apply, there is no credible basis for arguing that the Georgia Court of Appeals has violated federal antiboycott laws by ordering BNL to honor SMS's documents. BNL nevertheless makes this argument, seizing upon the January 1990 Commerce Department letter to do so. BNL contends that U.S. antiboycott laws bar BNL from using SMS's documents for reimbursement, and that, as a consequence, the Georgia courts' order that BNL honor those documents violates the antiboycott laws. BNL cites no specific provision of the EAA. Instead, it conjoins the inapplicable statutory defense with lengthy quotes from the statute's hortatory sections and legislative history. BNL then concludes grandiloquently that the Court of Appeals' "approach" conflicts with "the federal regulatory scheme." Petition, p. 24. The argument, whatever its other defects, is not relevant to the decision of the Georgia Court of Appeals, which rests entirely on state letter of credit law.

A. The Georgia Court of Appeals' Decision Rests Solely on State Law.

The premise of the Georgia Court of Appeals' decision is the "independence principle": that a letter of credit transaction involves at least three contracts between (a) the buyer and the seller, (b) the buyer and the bank that issues the credit, and (c) the bank and the seller (the "beneficiary" of the credit), and that each of these contracts is independent of the others. Pet. App. 4a. The only one of the three contracts before the Georgia courts was the letter of credit contract (strictly speaking, two letter of credit contracts) between BNL and SMS. There is no dispute that SMS presented the required documents to BNL, thus fulfilling SMS's obligations under that contract. The Georgia Court of Appeals held that, under the Georgia UCC (O.C.G.A. § 11-5-107(2)) and long-standing Georgia precedents,

BNL was therefore obligated to fulfill its part of the letter of credit contract and honor SMS's documents. *Id.*, 4a-5a.

BNL's antiboycott argument requires a determination that the alleged antiboycott obstacle to its reimbursement from a third party excuses BNL from this direct contractual obligation to SMS. Under the independence principle, however, there is no legal basis for reaching that issue:

> Adverse consequences for the issuer do not alter the issuer's obligation to honor complying payment demands. Thus, even though an issuer may not be able to obtain reimbursement from its customer, the issuer will not be excused from honoring a complying draft or demand for payment.

Hawkland & Holland UCC Series § 5-114:01(Art. 5)(1993). *See also, Voest-Alpine Intern. Corp. v. Chase Manhattan Bank*, 707 F.2d 680, 682 (2nd Cir. 1983) (confirming "bank's payment obligation to the beneficiary is primary, direct and completely independent"). Following this axiom of letter of credit law, the Court of Appeals held that a determination of BNL's antiboycott claims was "unnecessary" to its decision. Pet. App. 7a.

The Court of Appeals further observed that:

> any *future* difficulty BNL may encounter in presenting documents to [the Iraqi issuing bank] for reinbursement [sic] because of a violation of 50 USC App. § 2402(5) would necessarily be the result of *its own violation of federal antiboycott law*.

Pet. App. 5a (emphasis added). The reference to "future" difficulty resulting from BNL's "own violation of federal antiboycott law" indicates that the Court of Appeals recognized that any antiboycott issue in BNL's attempt to obtain reimbursement from the Iraqi bank would arise only *after* consummation of the transaction before the Georgia courts. There might, or might not, be such a difficulty, but that was an issue between different parties, arising out of a legally independent relationship, to be resolved by a different tribunal.

In sum, the Georgia courts have ruled that BNL is obligated under state law to pay SMS for BNL's wrongful dishonor of SMS's documents, and that any federal antiboycott obstacle to BNL's reimbursement rights is, as a matter of state law, irrelevant to that obligation. The Court of Appeals has not "decided an important question of federal law" meriting review by this Court. Indeed, since the Court of Appeals' decision rests on an independent and adequate state law ground, BNL's argument does not present a reviewable issue under 28 U.S.C. § 1257(a). See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1041-43 (1983).

B. A State Court *Dictum* Interpreting a Federal Regulation Does Not Warrant Review by the United States Supreme Court.

The Georgia Court of Appeals acknowledged BNL's argument that the Commerce Department official's letter might pose a problem for BNL if, after paying SMS, BNL sought to obtain reimbursement. The Court observed that, although any antiboycott difficulty "would necessarily be the result of [BNL's] own violation" of the antiboycott laws, "[t]his is not recognition . . . that BNL has violated any law." Pet. App. 5a. The Court then hypothesized that the antiboycott laws might not actually be a barrier because BNL might lack the "intent" required by the Antiboycott Regulations. *Id.* The Court appears to have intended this *dictum* as a favor to BNL. If BNL ever does challenge the Commerce official's reading of the Regulations in a federal court proceeding, the Georgia courts will at least have suggested that BNL has a plausible argument.

In a classic case of biting the hand that feeds you, BNL has seized on this suggestion from the Court of Appeals and tried to turn it into reversible error. Indeed, BNL devotes the most prominent part of its Petition to challenging the Court of Appeals' *dictum* interpreting the Antiboycott Regulations. Petition, pp. 15-18. But whether the Court of Appeals was right in this regard or not is beside the point. The Court's ruling that BNL is liable to SMS does not rest on its speculation as to the impact of the Antiboycott Regulations on a future transaction

but on its application of the plain terms of the Georgia UCC to the transaction before it.

III. BNL Remains Free to Challenge through Federal Administrative Procedures and the Federal Courts Federal Regulatory Obstacles, If Any, to BNL's Reimbursement Rights.

BNL's Petition is premised on the argument that it is barred by federal antiboycott laws from using SMS's documents to obtain reimbursement, and that grave issues of national policy will be compromised if the Georgia rulings are allowed to stand. BNL also represents that "[r]eview by this Court presents the only avenue of federal review available to BNL." Petition, p. 25. Both BNL's premise and its representation as to available federal remedies are false.

BNL's argument that it is barred from using SMS's documents for reimbursement rests on a single, informal letter from a junior Commerce Department official. See, pp. 4-5, *supra*. The letter acknowledges that under 15 C.F.R. § 769.2(f)(6) SMS's presentation of documents to BNL for payment is exempt from antiboycott letter of credit prohibitions. BNL has seized on the additional statement in the letter that, after paying SMS, BNL will be prohibited from using SMS's documents by 15 C.F.R. § 769.2(d), which prohibits the transmittal of antiboycott information.

Section 769.1(d)(20) of the Antiboycott Regulations explicitly states, however, that § 769.2(f) sets out "the circumstances in which paying, honoring, confirming, or otherwise implementing a letter of credit is covered *by this part*" (emphasis added). "This part" necessarily refers to *Part* 769, i.e., the Antiboycott Regulations as a whole. If, therefore, a letter of credit transaction falls within the exemptions of § 769.2(f)(6), as is the case here, that transaction is exempted from *all* antiboycott prohibitions. This is the only way the Regulations can be read, and neither BNL nor the Commerce Department, despite numerous opportunities, has suggested an alternative reading. (BNL conveniently avoids the issue in its Petition by not informing the Court of § 769.1(d).)

The exemptions in § 769.2(f)(6) of the Regulations for non-U.S. letter of credit transactions are, moreover, taken directly from the legislative history of the EAA. See, U.S. Senate Report No. 95-104, 95th Cong., 1st Sess., at 41 (1977)(statutory prohibitions of EAA governing letters of credit do not apply if "the beneficiary is not a U.S. person or the transaction in question does not involve U.S. commerce . . ."). The opinion in the January 1990 letter that some antiboycott prohibitions apply to letter of credit transactions where "the beneficiary is not a U.S. person" *and* "the transaction in question does not involve U.S. commerce" thus contravenes not only the Antiboycott Regulations but Congress's stated intention in enacting the EAA as well.

The junior bureacrat's opinion that the Antiboycott Regulations prohibit BNL from using SMS's documents to obtain reimbursement thus stands alone, unsupported by statute or regulation, not endorsed by any more senior Commerce Department official, disavowed even by BNL itself. BNL's proper recourse under these circumstances is the same as that of any other party aggrieved by an erroneous bureaucratic decision: dispute the decision in administrative channels; go to federal court if necessary. BNL has not pursued these remedies because it knows that, with or without SMS's documents, it will not obtain reimbursement from Iraq. Rather than accept the consequences of the risk of non-reimbursement that it knowingly assumed by confirming the letters of credit, BNL prefers to try to hide behind a bureaucrat's misreading of the law. Rather than pursue its normal federal remedies, BNL prefers to tell the United States Supreme Court that the remedies do not exist.

CONCLUSION

The issues of federal law raised in BNL's Petition are either (1) inapplicable, (2) irrelevant, or (3) *dictum*. These are not issues justifying review by the United States Supreme Court. BNL's Petition should be denied.

Respectfully submitted,

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